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Motions

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 MARK I. SOKOLOW, individually and  
4 as a natural guardian of plaintiff  
Jamie A. Sokolow, et al.,

5 Plaintiffs,

6 v.

04 Civ. 397 GBD RLE

7 PALESTINE LIBERATION ORGANIZATION,  
et al.,

8 Defendants.  
9  
-----x

12 May 26, 2011  
13 10:07 a.m.

15 Before:

16 HON. GEORGE B. DANIELS,

17 District Judge  
18  
19

20 APPEARANCES

21 ROBERT JOSEPH TOLCHIN,  
22 Attorney for plaintiffs

23 MARK J. ROCHE,  
BRIAN A. HILL,  
24 Attorneys for defendants  
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Motions

1 (In open court)

2 (Case called)

3 THE COURT: Mr. Rochon, let me start with your motion.

4 MR. ROCHON: Yes, sir.

5 THE COURT: Let me first ask first a basic question  
6 which I don't think any of the parties addressed.7 Why is this subsequent motion a motion that is even  
8 allowed by Rule 12?9 Rule 12 says that if you have a motion based on venue,  
10 and you make a 12 (b) motion, you're supposed to make it in  
11 that motion, and if you don't, you can't make your motion.12 How do you get past that rule? Even the commentary  
13 uses it as the example. If you have a motion for defense of  
14 venue, and you don't raise it in your 12 (b) motion, you can't  
15 come back and make a subsequent motion.

16 why is this a motion that should be entertained now?

17 MR. ROCHON: I imagine Mr. Tolchin will eventually  
18 argue to you he has raised that issue more or less because he  
19 claimed we have waived this issue. It is our position, your  
20 Honor, we have not filed under 12 (b). We haven't filed this  
21 motion as a motion under 12 (b). We filed under the transfer  
22 venue statute, which provides for, in an instance where a case  
23 is misvenued, to either dismiss all or in the interest of  
24 justice for transfer to a district or division where it could  
25 have been brought.

15QJSOKM

Motions

1                   THE COURT: Well, that statute doesn't provide the  
2 vehicle by which the court is supposed to make that  
3 determination. There are only certain kinds of motions that  
4 can be made. That section doesn't say you have a right  
5 independent of 12 (b) for summary judgment or anything else to  
6 make a motion under that section. That section doesn't deal  
7 with your right to make a motion at all. There are only  
8 certain kinds of motions.

9                   What kind of motion is this if it is not a 12 (b)  
10 motion? If it is simply a motion as described in 12 (b),  
11 raising a defense of venue under the statute, I guess you're  
12 talking about 1406?

13                  MR. ROCHON: Yes.

14                  THE COURT: 1406 doesn't say you get to raise this  
15 issue in any other manner other than as a defense in your  
16 answer and a defense at trial or by way of motion under 12 (b)  
17 or by way of motion in summary judgment. What other motion is  
18 there other than those motions?

19                  MR. ROCHON: Your Honor, a few comments.

20                  The first will be we have raised it as a defense in  
21 this case, the venue issue.

22                  Secondly, I understand the court, but I might  
23 respectfully disagree with the court because I think the  
24 statute does provide for relief when a case is misvenued, and  
25 that issue can be raised with the court not simply through a 12

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Motions

1 (b). I think it is properly raised under that statute to raise  
2 what we call the wrongly venued matter here.

3 The bases for the motion are bases we have argued to  
4 the court in our papers, are bases that are properly raised at  
5 this time because the factual basis for it turns on your ruling  
6 in this case as to personal jurisdiction.

7 We would contend we certainly haven't waived it and it  
8 is properly brought under 1406 because 1406 provides for a  
9 remedy that is not simply dismissal.

10 THE COURT: You're seeking dismissal? Are you not  
11 seeking dismissal? You're only seeking transfer?

12 MR. ROCHON: We are moving under 1406. The case is  
13 asserting the wrongful venue and saying to the court it can be  
14 dismissed, or in the interest of justice, can be transferred.

15 To be candid, this is a case Mr. Tolchin has argued if  
16 it were to be dismissed, the plaintiffs would be out of court  
17 on the statute of limitations problem or some of them would be.  
18 I think actually all of them would be, and I think it is likely  
19 you would exercise your discretion to transfer rather than  
20 dismiss.

21 THE COURT: I am not as concerned about my discretion;  
22 I am concerned what your motion is. Are you moving to dismiss  
23 this case on venue grounds?

24 MR. ROCHON: Both to dismiss --

25 THE COURT: Don't give me both.

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Motions

1 MR. ROCHON: In the alternative, to transfer.

2 THE COURT: Are you, in fact, asking me to dismiss  
3 this case on venue grounds?

4 MR. ROCHON: Yes.

5 THE COURT: Is that the nature of your motion?

6 MR. ROCHON: The answer to your question is yes.

7 THE COURT: Why is that not a motion to dismiss based  
8 on venue that the statute specifically says, and I will read  
9 you the commentary about it under Subsection (g):

10 "Thus, if the defendant moves before answer to dismiss  
11 the complaint for failure to state a claim, he is barred from  
12 making a further motion presenting the defense of improper  
13 venue if that defense was available to him when he made his  
14 original motion."

15 Isn't that pretty directly on point?

16 MR. ROCHON: We would suggest to the court that the  
17 bases for the defense at this juncture arises out of this  
18 court's ruling on the context of the defendant with this  
19 jurisdiction.

20 THE COURT: Well, no. The argument you made now is  
21 the same argument you could have made then.

22 MR. ROCHON: It is an argument, the factual basis for  
23 which we asserted there is no jurisdiction in the United  
24 States.

25 THE COURT: Right.

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Motions

1                   MR. ROCHON: We asserted there is not jurisdiction  
2 here or anywhere.

3                   THE COURT: And you could have asserted there was no  
4 venue, either.

5                   MR. ROCHON: That is, of course, if you have no  
6 jurisdiction, obviously there is no venue, either.

7                   THE COURT: The grounds even you assert for no venue  
8 are the exact same grounds you asserted for no jurisdiction.

9                   MR. ROCHON: And we prevailed in part on those grounds  
10 as to this jurisdiction.

11                  THE COURT: Yes, but that is exactly what the rule's  
12 trying to preclude, the piecemeal saying I am only going to  
13 bring it if I prevail on a motion on jurisdiction, I am only  
14 going to raise venue at a later time.

15                  There is nothing, I don't hear you saying there was  
16 anything that prevented you from making this motion at the time  
17 you made the jurisdiction motion and prevailing if you thought  
18 that you should have prevailed. Nothing has changed. The  
19 facts haven't changed as you argue them and as you're arguing  
20 for jurisdiction and the law hasn't changed from which you will  
21 argue.

22                  MR. ROCHON: Have a couple of responses.

23                  The first is, I think procedurally we should not be  
24 disqualified from raising this issue either by converting it to  
25 a 12 (b), and then you might say we should have raised it

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Motions

1 sooner or by raising we can bring, recognizing we can bring it  
2 under the statute.

3 There is one critical fact that has changed. The only  
4 person who matters has said there is not sufficient contacts of  
5 our client here for the purposes of jurisdiction.

6 THE COURT: For the purposes of jurisdiction?

7 You made no issue, nor did I opine as to whether or  
8 not there was sufficient contacts for the purpose of venue.

9 MR. ROCHON: I agree with the court, but I also would  
10 suggest to the court the case law is clear that contacts for  
11 the purposes of jurisdiction are not different than the  
12 contacts for the purpose of venue. If there are disallowed  
13 contacts under jurisdiction, there would also be disallowed  
14 contacts under venue.

15 THE COURT: I haven't seen a case that specifically  
16 says that. It depends on whether or not -- we are not talking  
17 about -- quite frankly, no determination was made by me that  
18 the contacts were insufficient, there were insufficient, few  
19 contacts with New York for the purpose of jurisdiction.

20 I said the Klinghofer exception, despite the fact  
21 there were great contacts with New York, indicated that the  
22 Second Circuit said you cannot use those contacts for the  
23 purpose of asserting, constitutionally asserting jurisdiction.  
24 Venue is not -- an analysis of venue, and I haven't opined on  
25 this, and quite frankly I don't think anyone has opined on

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Motions

1       this, that is what the plaintiff is afraid of, but the contacts  
2 I analyze for venue have a different purpose than the contacts  
3 that I analyze for jurisdiction.

4           The contacts I analyze for jurisdiction have to do  
5 with the authority of the court to adjudicate the claim and to  
6 have authority to issue judgments and orders against the  
7 plaintiff. The issue of venue primarily deals with the  
8 convenience of the parties and whether or not it is fair and  
9 within the interest of justice to litigate the claim over which  
10 I do have jurisdiction, subject matter and personal  
11 jurisdiction, over to litigate those claims in a particular  
12 forum.

13           It is not a Constitutional barrier to litigating the  
14 claim. It is a question of whether or not there are sufficient  
15 contacts with the jurisdiction so that it is not unfair to drag  
16 the party from some foreign place to have to fight the case in  
17 this remote jurisdiction.

18           Whether or not I would or the Second Circuit would or  
19 any other court would say that under this statute, unique set  
20 of circumstances where the assessment of jurisdiction is  
21 somewhat different than the assessment of venue, that a  
22 determination that certain contacts cannot be used for the  
23 purpose of jurisdiction also means even though those contacts  
24 exist, that those contacts preclude this district from being a  
25 convenient forum for the litigation.

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Motions

1           I don't think I have seen any case -- and I have a  
2 stack of cases I have been looking through -- I haven't seen  
3 any case that addresses that point. I assume your argument, as  
4 I read your argument, is that look, because you said, when I  
5 made a motion to dismiss for personal jurisdiction that is  
6 consistent with Klinghofer, the contacts in New York that the  
7 defendant argues and the plaintiff has not sufficiently  
8 demonstrated are not contacts with the UN, UN activity, that  
9 because I rule that those were not sufficient to lay  
10 jurisdiction or the contacts in DC were sufficient for  
11 jurisdiction, that that somehow dictates a conclusion that  
12 that's a decision with regard to venue or simply it can't be  
13 used for the purpose of jurisdiction, that it means it follows  
14 it necessarily can't be used for the purpose of venue.

15           Is that basically your position?

16           MR. ROCHON: I hate to simply say yes because the  
17 court did speak for a while. I think the court has captured  
18 some of the essence of the position. First of all, we haven't  
19 carefully used the word cognizable contacts. I recognize it  
20 was based on the Klinghofer decision. I don't mean to  
21 misconstrue your decision. It is our view the Klinghofer  
22 exception, which does apply to a foreign, not just another  
23 state, but overseas entity applies with equal force essentially  
24 to venue considerations as it does to jurisdiction  
25 considerations.

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Motions

I understand that hasn't been ruled on explicitly, but I don't see a meaningful reason to distinguish between hailing a foreign entity, country or nescient country, whatever it may be, into a place where there are not cognizable contacts for jurisdiction, but to say nonetheless they should be held in for the purpose of venue when venue, especially when venue has been pled on the basis of the defendant's contacts, that is the case here, what we have suggested, and you raise thorny issues, Judge.

THE COURT: I don't raise them.

MR. ROCHON: You at least recognize them. They're resolved by moving the case to the District of Columbia. We are seeking to move the case there. In other words, it is not like we can move the case to the District of Columbia and then say oh, you shouldn't have moved it there because you made a finding on contacts there. We're stuck with it for the purposes of this case.

The plaintiffs have argued you shouldn't move it there, and they really have a couple of reasons. One of them is delay. There are two parts to the delay argument. I find one of them to be completely without merit, I have to be honest. It is there, there would be delay because you wouldn't have to rule on this motion. I just don't get that. We briefed it. I can't imagine this court finding a way to not decide it. So the idea you avoid delay by not -- by somehow

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Motions

1 let's just send it to the Eastern District of New York and then  
2 you don't have to grapple with these issues, that is not how  
3 this case is pled. I don't think there is analytical framework  
4 in which this court could not reach the issues of the 1406  
5 motion.

6 THE COURT: Aren't you entitled to, though -- if  
7 you're entitled -- under your motion if you're entitled to  
8 relief based on venue at this point? Aren't you entitled to  
9 one of two things and not one of three things:

10 You're entitled to either dismissal or you're entitled  
11 to transfer, but you're not necessarily entitled to transfer  
12 where you want to go. You're entitled to transfer to a place  
13 where the case could have been brought at the time this case  
14 was brought.

15 Obviously, you want to get to DC. They want to go  
16 across the bridge to Brooklyn. How is it that you say that  
17 you're entitled to be in DC rather than in Brooklyn, legally  
18 entitled?

19 MR. ROCHON: I will address this.

20 There appears to be some desire by the parties to get  
21 to certain places. By the end of this argument you'll see that  
22 the defendants think some of the plaintiffs' asserted reasons  
23 don't hold water. Our view of the statute and the words "could  
24 have been brought," we have noticed they're different than the  
25 words in 1404, when a case is sought to be moved that is

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Motions

1 properly venued, that the court can consider in the interest of  
2 justice move it to where it might have been brought.

3 THE COURT: Okay.

4 MR. ROCHON: 1404 is "might." 1406 is "could."

5 THE COURT: What is the substantive difference that  
6 makes a different determination in this case depending on might  
7 or could?

8 MR. ROCHON: If the plaintiffs had pled their  
9 complaint differently, they might have been able to bring it in  
10 a lot of places.

11 THE COURT: No, they can only bring it in places where  
12 the statute would authorize they could bring it.

13 MR. ROCHON: Which would include where the plaintiffs  
14 reside. They reside in a lot of places. There could have been  
15 a lot of places where they could have brought it.

16 THE COURT: And they might have brought it.

17 MR. ROCHON: Might have brought it.

18 THE COURT: What is the difference?

19 MR. ROCHON: When you do speak of "could have" -- and  
20 I spoke loosely for a second -- when you talk about where they  
21 could have brought this complaint, this complaint which bases  
22 venue on the defendants' contacts, they have asserted in the  
23 complaint a basis for the assertion of venue. They did not  
24 plead plaintiffs' residences as a basis for venue in this case.  
25 They pled defendants' contacts.

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Motions

1                   THE COURT: That doesn't matter for the purpose of the  
2 statute that you want me to proceed under or the purpose of the  
3 statute they want to proceed under. There is no requirement  
4 that I can only entertain one or other motion to transfer  
5 depending on how they alleged it in their complaint. That is  
6 not the analysis. The analysis is whether or not this is a  
7 place -- and I'll say it even differently when I have to  
8 confront both of you on this issue -- I have to decide whether  
9 or not it is a place that they could have and might have  
10 brought it at the time.

11                   Brooklyn is a place they that could have and might  
12 have brought it at the time and DC is a place that they could  
13 have and might have brought it at the time. It doesn't matter  
14 what they said in the complaint. They could have said venue in  
15 the complaint was based on contacts in California. It doesn't  
16 matter what they're alleging. It matters whether or not they  
17 could have and might have brought it in a particular  
18 jurisdiction. I still don't understand how you say the  
19 language of, "could have" gives you some greater advantage than  
20 the language of, "might have."

21                   MR. ROCHON: It is our position, your Honor, and I  
22 understand it is our position when the language "could have"  
23 refers to where the plaintiffs could have brought this  
24 complaint, and the complaint is based on our clients' contacts,  
25 what we're suggesting to the court where you filed, our

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Motions

1 contacts have contacts in the District of Columbia. It could  
2 have been brought there, this complaint. This complaint pleads  
3 venue based on our clients' contacts could not have been  
4 brought in Brooklyn.

5 THE COURT: No.

6 MR. ROCHON: We are not present in Brooklyn.

7 THE COURT: You have just, as they say, your words  
8 have just betrayed you because the statute does not say where  
9 the complaint, this complaint could have been filed or could  
10 have been brought. It says where the case could have been  
11 brought. So you can't -- if your argument is based on well,  
12 the complaint as it is written could only have been brought in  
13 New York because they allege New York contacts, that is not  
14 what the rules say. It says where the case could have been  
15 brought.

16 If the case at the time could have been brought on  
17 this complaint or any other complaint, it seems to me that the  
18 law is fairly consistent that that's what's determinative, not  
19 whether or not this complaint, an amended complaint, a  
20 different complaint, a second amended complaint, would have  
21 been sufficient in a particular venue. It is whether or not  
22 this case, there is sufficient facts that are consistent with  
23 the venue statute that would have allowed, could have allowed  
24 them to bring the case there and is a place they might have  
25 brought it if they realized they're going to have all the

15QJSOKM

Motions

1 problems with you they're having today.

2 You know, I assume it is not your argument that they  
3 could not have sued your clients for the claims that they're  
4 asserting against your client in Brooklyn. That is not your  
5 position?

6 MR. ROCHON: When you phrase it that way, our position  
7 on interpreting the statute is clear.

8 THE COURT: I understand that.

9 MR. ROCHON: If you're saying had the plaintiffs filed  
10 an original complaint, and they asserted venue based on where  
11 they resided, not where my client resided -- in other words, in  
12 a different case, it could have been brought there --

13 THE COURT: In the standing case.

14 MR. ROCHON: -- I think it does matter how venue is  
15 pled in the complaint. The plaintiffs brought our clients to  
16 the United States of America for this litigation, asserted a  
17 basis to have venue in the United States of America, and now  
18 want to abandon that theory of venue and go to a new one in  
19 light of the fact they had some lack of success on the contacts  
20 with this jurisdiction.

21 Our view is they shouldn't then get to pick, and we  
22 have to look at, and I think you should look at the complaint  
23 as pled and the bases for this.

24 THE COURT: I don't know of any case law that supports  
25 your position because what you would be arguing -- and I think

15QJSOKM

Motions

1 that both in case law and logic, it is not supported -- what  
2 you would be arguing is under any transfer of venue, that I am  
3 precluded to transfer venue, I am limited to what they asserted  
4 was the basis of the venue in the complaint.

5 So if they asserted that they allege that the  
6 defendant resides in New York and that's what they said in the  
7 complaint, and now they want to transfer the case for forum non  
8 conveniens reasons to California because all of the witnesses  
9 and everybody and the parties live in California and all the  
10 plaintiffs live in California, your argument would be somehow  
11 I'm precluded from transferring it to California because they  
12 didn't allege as a basis for venue the fact that they lived in  
13 California originally. There is nothing that jurisdictionally  
14 prohibits me from transferring it to a place where it might  
15 have been brought.

16 MR. ROCHON: I don't think I am arguing that. You're  
17 describing a 1404 motion.

18 THE COURT: That is their motion.

19 MR. ROCHON: That is their motion, a case which is  
20 brought when this case is properly venued, but we are not  
21 proper, in our view. You may disagree with me. The  
22 defendants' view, we are not currently properly venued here.  
23 You can't reach the plaintiffs' motion under 1404 unless you  
24 determine that we're properly venued here, and we are moving  
25 otherwise.

15QJSOKM

Motions

1                   THE COURT: But, no, no. Even if I would have granted  
2 your motion, even if I were to grant your motion and say okay,  
3 let me agree with you, that still doesn't tell me where I get  
4 to transfer it to, right?

5                   Even if I go on 1406 and say you have totally  
6 convinced me it shouldn't be here, I have to find another place  
7 where it could have been brought, it is still going to give me  
8 DC and Brooklyn, isn't it?

9                   MR. ROCHON: Here is where we have sharpened our area  
10 of potential disagreement for the purpose of our colloquy. I  
11 hope we agree at the end.

12                  For the purpose of this colloquy, I believe 1404 and  
13 1406 with their different standards and the different  
14 interpretations under which you transfer under 1406, in our  
15 view, if the plaintiffs bring a case in a district or division  
16 without proper venue, it should not come as a surprise their  
17 opportunity to move it elsewhere won't be as liberal as if they  
18 brought it in a properly venued jurisdiction.

19                  THE COURT: Why?

20                  MR. ROCHON: Because they already haled the defendant  
21 into the wrong courthouse, and it should not come as a  
22 surprise, therefore, they can't just move them about quite as  
23 readily as if they brought them into the right courthouse so  
24 they were there and there was a discussion whether the case  
25 should be moved. In our view, 1404 -- and cases discuss

15QJSOKM

Motions

1       this -- in our view, the plaintiffs should not be so easily  
2       able to have in a case wrongly venued, move the defendants  
3       about as they wish.

4                  THE COURT: Yes, but I am not talking about 1404. I  
5       am talking about let's assume I agree with everything you say  
6       about the appropriateness of doing this and having to  
7       articulate that I have to do this under 1406. Even if I do it  
8       under 1406, it doesn't necessarily give you the right to choose  
9       where it goes.

10                 MR. ROCHON: I think we interpret -- for the purpose  
11      of this colloquy, it may be we have disagreed on an aspect of  
12      it. We interpret the language "could have been brought"  
13      differently than the court is.

14                 THE COURT: You say "could have" means only how  
15      exactly this complaint reads now, that that is the restriction.  
16      It doesn't mean, as they say, doesn't mean exactly what it says  
17      that the court in the interest of justice can transfer such  
18      case to any district or division in which it could have been  
19      brought. The case, that is what it says. It doesn't say the  
20      complaint. It doesn't say, doesn't limit it to anything other  
21      than the nature of the case.

22                 MR. ROCHON: Actually, this language of interest of  
23      justice, your Honor, is again in both statutes --

24                 THE COURT: Right.

25                 MR. ROCHON: -- in different places, and you read

15QJSOKM

Motions

1 those two, interest of justice in 1406 is not modifying the  
2 question of where you can send it. It is modifying whether you  
3 dismiss it.

4 THE COURT: Right. I understand that.

5 MR. ROCHON: Whereas, in 1404 when they talk about the  
6 interest of justice, they're talking about where you send it.  
7 They're different statutes. I understand the court --

8 THE COURT: I am trying to understand, you are not  
9 arguing it is not in the interest -- as a matter of fact, you  
10 argued just the opposite -- you're not arguing it is not in the  
11 interest of justice to transfer this case as opposed to dismiss  
12 it.

13 You're arguing about whether or not it is in the  
14 interest of justice to transfer this action to another  
15 district, and I am not sure what else are you saying that the  
16 interest of justice means other than for the convenience of the  
17 parties and the witnesses under 1404. I think it is properly  
18 broader than that, but that is the only thing that is  
19 articulated.

20 I don't hear you saying, you arguing that it is not in  
21 the interest of justice to transfer this as opposed to dismiss  
22 it or that you're arguing it is not in the interest of justice  
23 to transfer it to Brooklyn as opposed to DC?

24 MR. ROCHON: When you talk about interest of justice,  
25 what really matters to the defendants is whether you're talking

15QJSOKM

Motions

1 under 1404 or 1406 how those words, what those words, what they  
2 mean.

3 THE COURT: You're not arguing it is not in the  
4 interest -- there is an articulatable way to say it is not in  
5 the interest of justice to transfer this case as opposed to  
6 dismiss it under 1406, or in the interest of justice not to  
7 transfer it to Brooklyn as opposed to the interest of justice  
8 demands that I transfer it to DC.

9 MR. ROCHON: Again I guess where we're -- the  
10 defendants -- are, I would like to lay out our analytical  
11 position how we think the court ought to approach the issues.

12 The plaintiffs have argued we have waived this issue,  
13 and the court has started the argument with questions along  
14 those lines. If you decide we have waived this issue, then I  
15 think you reach the plaintiffs motion under 1404; but when you  
16 decide we have waived it, now we are properly venued before  
17 you.

18 THE COURT: Let me let you finish, but let me put that  
19 issue aside. That is their argument you have waived it. My  
20 questions were not about waiving. I am not inquiring whether  
21 you have waived it.

22 What I see the circumstances are, you made a motion to  
23 dismiss, you made a motion raising the defense of venue. The  
24 statute says, the rule says if you make a motion and you don't  
25 raise that in your motion, you can't make a subsequent motion

15QJSOKM

Motions

1 raising that.

2 Now, I understand that even though you made the motion  
3 and you didn't raise it in the motion when you filed the  
4 answer, you put it in your answer. It is a different question  
5 whether you still have the right to pursue that defense. That  
6 wasn't my inquiry. My inquiry is whether or not you have the  
7 right to make successive motions, one, two, three, four, 15  
8 motions, 15 motions raising defenses, asking to dismiss the  
9 case, raising those defenses when the statute says no,  
10 procedurally that is not the way, even if you don't waive the  
11 defense, procedurally you can't piecemeal the motions that way.

12 That is my question. I am not trying to imply I was  
13 asking you about waiver itself.

14 MR. ROCHON: Understood. It is plaintiffs' argument  
15 you may never waive this issue, and you are suggesting it might  
16 not be properly raised via this statute at this time, which in  
17 our view you would then reach, would reach the 1404 motion  
18 which has particular problems. The plaintiffs say we shouldn't  
19 go to the District of Columbia and test that.

20 The first thing they say, the delay would come from  
21 ruling on this, and I'll frankly hear further from you on that  
22 but, Judge Daniels, you will have to decide the issues and you  
23 will decide them, I am sure, carefully. I may not always  
24 agree, but I am confident you'll be careful.

25 The next question, they say there will be delay

15QJSOKM

Motions

1 because you have to revisit all of your rulings in the District  
2 of Columbia. I have two things to say:

3 First of all, the District of Columbia judges, who I  
4 know very well, would give short-shrift to such an effort;

5 Secondly, if you moved it to the District of Columbia,  
6 we commit not to revisit your rulings. We are not trying to go  
7 to the District of Columbia to file darn near frivolous motions  
8 to reconsider rulings issued by this Court. To the degree they  
9 raise that and say of course we are going to do so, on behalf  
10 of the defendants, I am telling you we will not.

11 Secondly, they say we are -- they also say it is some  
12 sort of delay I guess associated with the going to the District  
13 of Columbia. I live there and practice there. The judges  
14 there I believe are competent and I don't think they will be  
15 unnecessarily slow. Therefore, the idea of delay is not  
16 proper.

17 But to the degree you rejected all our other arguments  
18 on 1406 and our interpretation of it and their interpretation  
19 of 1404, et cetera, and you got to the idea you can send this  
20 case to any place where it could have brought, we were served  
21 in the Eastern District of Virginia, Alexandria Division. That  
22 is a place if you reject our other arguments where there would,  
23 therefore, be venue.

24 THE COURT: That is not DC.

25 MR. ROCHON: That is not DC. I am telling you it is

15QJSOKM

Motions

1 the so-called rocket-docket. If you deny parts of our  
2 argument, you can send us there, we'll be done with this case  
3 in a year or less.

4 THE COURT: I don't understand.

5 MR. ROCHON: His argument that this is about delay,  
6 the defendants find -- we haven't delayed this matter, in our  
7 view. Even if they think so, certainly since we have been in  
8 the case, we haven't done anything to delay this matter, in our  
9 view.

10 Mr. Tolchin says there have been other cases where the  
11 defendants have sought extensions of time. Mr. Tolchin and I  
12 litigate with each other in these cases often. He seeks  
13 extensions of discovery. I oppose them. That is civil  
14 litigation. A judge can say a defendant has time to end the  
15 case, hoary litigation, and calls it to an end.

16 The fact of the matter, there the judges know how to  
17 manage their docket. Worst comes to worst, and you want to  
18 send it somewhere and you reject our other arguments, there is  
19 also a basis to send it to the Eastern District of Virginia. I  
20 would like the court to ask Mr. Tolchin how do you feel about  
21 that if you're so concerned about speed.

22 THE COURT: I ask you both the same question. Why  
23 don't you want to go to Brooklyn? And why don't they want to  
24 go to DC? That is the only question. I don't hear any  
25 compelling arguments that indicate to me that I should

15QJSOKM

Motions

1 naturally assume this case is better off someplace for anybody.

2 The argument you just made to me is that I send the  
3 case across the river to the judges over there that I know, and  
4 I am sure that the case will be litigated on its merits and  
5 there will be a fair and efficient determination.

6 You are broadening your stance now. We don't have to  
7 necessarily have to transfer it to DC. I can transfer the case  
8 to Virginia if you want, but just don't transfer it to  
9 Brooklyn?

10 MR. ROCHON: There is a suggestion by the plaintiffs  
11 that somehow the defendants are wrongly motivated in this  
12 motion. I am suggesting to the court that can be tested.

13 THE COURT: That is not a determinative factor in my  
14 assessment of whether or not transfer is appropriate and which  
15 district would be an appropriate and not convenient forum in  
16 which to resolve these disputes. I am not sure anyone has  
17 articulated for me why any of these forums are more  
18 inconvenient than any other forum.

19 MR. ROCHON: In that regard, I should address a couple  
20 of other points made by the plaintiffs before you turn to Mr.  
21 Tolchin. One of the more clever things Mr. Tolchin has done  
22 on pages 16 to 17 of his initial motion, he referred to the  
23 litigation in the Eastern District and cited a few cases that  
24 he brought there, and he parenthetically called it "related  
25 cases."

15QJSOKM

Motions

1                   Just so it is clear, those are not related cases under  
2 that term of art as it is understood. If the case ended up  
3 there it, would not be a related case. The cases he refers  
4 aren't even in the front of the same judge. Clearly the  
5 related case doctrine, I don't want the court to think that is  
6 met here.

7                   THE COURT: If you want transfer out of this district,  
8 that is what you're entitled to. I am trying to understand why  
9 you don't want to go to Brooklyn, that is all.

10                  MR. ROCHON: Your Honor, I think Mr. Tolchin has made  
11 a tactical decision for some reason he doesn't want to go to  
12 District of Columbia.

13                  THE COURT: You're making a tactical reason for some  
14 reason you don't want to go to Brooklyn. I am trying to pull  
15 it out of both of you. Is there something you want to  
16 articulate to me other than your tactical reason? I assume he  
17 doesn't want to go to DC and it is your tactical reason you  
18 don't want to go to Brooklyn. Is there some other substantive,  
19 legitimate reason somebody can articulate to me one forum is  
20 inappropriate?

21                  MR. ROCHON: I have a good one which I think is on our  
22 argument, your Honor, the forum that the case would need to be  
23 transferred to is the District of Columbia. The degree the  
24 plaintiffs say they're worried about the possibility of  
25 appellate review and issues being created, et cetera, their

15QJSOKM

Motions

1 notion is you can resolve all of that by sending it to the  
2 Eastern District of New York is not supported because, in fact,  
3 our arguments are that the court may not send it there under  
4 our analysis of 1406. I understand you have asked me  
5 questions.

6 THE COURT: Why don't you want me to send it there?  
7 That is what I am asking. You don't care or you don't want to  
8 be in Brooklyn?

9 MR. ROCHON: Frankly, I would like to go to the  
10 District of Columbia. Failing that, your Honor, we don't have  
11 an aversion to this courthouse, this court, and this court has  
12 had this case for a considerable period of time.

13 THE COURT: You guys are giving me limited choices,  
14 and that is not one of them. The choices you're giving me,  
15 Judge, it is compelling to transfer this case to DC. The  
16 plaintiff is saying, Judge, it is compelling to transfer this  
17 case to Brooklyn. Quite frankly, neither side has articulated  
18 a particularly compelling reason to go any particular place or  
19 any other place or any particular compelling reason that the  
20 place you want to choose is a better forum in which to litigate  
21 this case.

22 MR. ROCHON: Right.

23 THE COURT: The only thing I can analyze is whether or  
24 not -- let me put it this way: It is unlikely I will dismiss  
25 this case. That is not in the interest of justice. The

15QJSOKM

Motions

1 interest of justice is here, unless you have some more  
2 legitimate arguments to make, would clearly indicate even under  
3 your analysis it would be more appropriate to transfer this  
4 case rather than dismiss it if the relief you're looking to is  
5 to have it transferred or dismissed.

6 My attitude is that is what you're entitled to.  
7 You're entitled to transfer out of this district. You're  
8 entitled to transfer out of this district and entitled to  
9 another district where this case can be litigated, this case  
10 can be litigated on its merits, and you're entitled, and I  
11 should take into consideration with which district I choose,  
12 the convenience of the parties and the witnesses..

13 I don't think the statute, whether it is under your --  
14 if anything, the statute you're proceeding under gives you less  
15 choice about where it should go than the statute that they're  
16 proceeding under because the statute they're proceeding under  
17 clearly indicates that I should at least consider the  
18 convenience of the parties and the witnesses.

19 Your statute is basically, you know, no, you're wrong,  
20 in the wrong venue, get out of here. That is exactly what you  
21 have, not the right to pick and choose where you want to go.  
22 They have more of a right. You analyze it another way, I  
23 understand the analysis they put it in the wrong forum and they  
24 shouldn't expect to pick their forum. That doesn't get you to  
25 pick. That means I get to choose, not you unless you can tell

15QJSOKM

Motions

1 me some choice is much more compelling in the abstract than any  
2 other.

3 Quite frankly, I'm not quite sure what it is  
4 tactically because I don't think there is any substantive  
5 reason for either one of these motions. Tactically, I am not  
6 quite sure I can guess, surmise what the two of you even are  
7 trying to accomplish by your motion, but I don't have a, I  
8 can't articulate for myself a way to describe that DC is the  
9 place where it is so compelling to be as opposed to Brooklyn,  
10 as opposed to Virginia.

11 MR. ROCHON: Maybe I can do a better job. I hope so.

12 I represent a foreign entity that has quasi, through  
13 the PLO, diplomatic relations with the United States. In New  
14 York City those contacts aren't cognizable, and in the District  
15 of Columbia where they are. As a foreign litigant,  
16 particularly this foreign litigant, being hauled into not the  
17 nation's capital has some significance. It is the place where  
18 the business of the United States is principally conducted. It  
19 is where the foreign policy of the United States is principally  
20 conducted. I am not suggesting the State Department will come  
21 in and do something there they wouldn't do anything else.

22 If the court recognizes that as a foreign litigant and  
23 as a principal litigant that is not overly familiar with the  
24 judicial process of the United States, and it is developed over  
25 the last several years, you have been witness to it. You

15QJSOKM

Motions

1 remember we replaced predecessor counsel, and I am having to  
2 tell you there is a sea change how our client reacts to U.S.  
3 initiated litigation for conduct that occurred over there.

4 All of those cases were defaulted, being defaulted  
5 intentionally prior to us coming in. We had to move to vacate,  
6 convince judges up and down the Eastern seaboard when we meant  
7 it, when we said we want to litigate the case. We have taken  
8 cases through discovery and settlement. We won appeals. We  
9 have had cases dismissed in the trial courts.

10 We have demonstrated, we believe, our client is  
11 committed to litigating these cases properly. Nonetheless, as  
12 a foreign litigant, especially this litigant, being hailed  
13 into -- I know Brooklyn, you know Brooklyn, but if you're  
14 sitting in Ramallah, Brooklyn doesn't sound like either the Big  
15 Apple, New York -- excuse my reference -- but everyone knows  
16 New York City, Washington, D.C.

17 Judge, it is different as a foreign litigant. You  
18 should take that into strong account especially if this case is  
19 misvenued here. Then you ask about what are my tactical  
20 considerations? My client, when it hears and receives rulings  
21 that emanate from Washington, D.C. or New York, they know they  
22 are properly in this place.

23 THE COURT: Brooklyn is New York, too.

24 MR. ROCHON: I've got worse problems. I am from the  
25 midwest.

15QJSOKM

Motions

1 THE COURT: My colleagues will --

2 MR. ROCHON: The people in the audience will beat me  
3 up on the way out. The point, you can imagine, these are  
4 sensitive and delicate cases for overseas litigants. There is  
5 some sense to having them heard in the place where they are,  
6 more so than most defendants.

7 THE COURT: The only way I can characterize the  
8 argument you just made is that you want to go to DC for your  
9 clients' comfort level.

10 MR. ROCHON: There are appearance issues. That is as  
11 important over there as it is to folks over here.

12 THE COURT: You put it in an awkward circumstance by  
13 saying we see these decisions come out of, "the real New York  
14 City" or DC.

15 MR. ROCHON: Actually, for my client it is really the  
16 District of Columbia.

17 THE COURT: That is what I was going to say. You  
18 can't back away from that argument because they're the one that  
19 wants to leave the real New York State.

20 MR. ROCHON: Personally, I believe all of these cases,  
21 it would make sense to consolidate. I am not seeking to move  
22 for that. I am seeking to move this one there.

23 THE COURT: You are not saying that, you are not  
24 saying that your client has a greater comfort level and is  
25 satisfied with litigating this case in DC and the real New York

15QJSOKM

Motions

1 City as opposed to Brooklyn because you're the one asking me to  
2 take it out of the real New York City. You are the one not  
3 waiving venue. You are the one that wants to move out of New  
4 York City.

5 The argument you're making, that is the problem, the  
6 kinds of considerations that you say that are motivating you  
7 are not the kinds of considerations -- those are the kinds of  
8 considerations related to 1404, not to 1406. 1406 deals with  
9 being in a wrong venue. You're telling me we are in the wrong  
10 venue, put us in a right venue, not the right venue, a right  
11 venue.

12 MR. ROCHON: What I said is under 1406, in our  
13 interpretation of it, the only place that you could, should  
14 send it is the District of Columbia.

15 THE COURT: Right.

16 MR. ROCHON: You then would have asked me would you  
17 please articulate for me reasons why you would want it in the  
18 District of Columbia as opposed to other places. I will  
19 respond to that, and I was being candid with the court. It  
20 doesn't eliminate our position if we think that frankly the  
21 place you have to send this to is the District of Columbia  
22 which questions presuppose you might not buy that. You asked  
23 me to comment on why there instead of the Eastern District of  
24 New York.

25 THE COURT: This is helpful to me because as we focus

15QJSOKM

Motions

1 on this, it seems what is determinative, critical if not  
2 determinative of your argument, of your position is for me to  
3 accept that your very now and unique argument that because it  
4 says "could," that that must be interpreted as the way the  
5 complaint alleged venue originally, that is the only thing that  
6 you can consider with regard to where the case could be.

7 I still don't understand how to get you in DC because  
8 it is not alleged that venue --

9 MR. ROCHON: The theory for venue is contacts. There  
10 is findings of fact in this case by this court as to contacts  
11 in the DC.

12 THE COURT: What language in the complaint to you do  
13 you say this complaint could not have been brought in Brooklyn?

14 MR. ROCHON: The part, Paragraph 4.

15 THE COURT: That says what?

16 MR. ROCHON: Says venue based on defendants' contacts.

17 THE COURT: Just the broad language that says it is  
18 based on contacts?

19 MR. ROCHON: The assertion for Paragraph 4 of the  
20 complaint is our contacts, not plaintiffs' residence.

21 THE COURT: You say, either with or without an  
22 amendment, that that restricts the choice of transfer to a  
23 venue that is chosen simply based on their character rather  
24 than a venue chosen on any other legitimate ground as alleged  
25 in the statute that could have been brought?

15QJSOKM

Motions

1                   MR. ROCHON: Our argument is you should take the  
2 complaint's asserted basis for contacts and that could have  
3 been brought in District of Columbia based this court's  
4 finding. So I think you understand our argument even if you're  
5 not entirely agreeing with it.

6                   THE COURT: I want to make sure I understand it. You  
7 say at this point since they alleged venue on your clients'  
8 contacts, they cannot seek transfer under 1406 in a place where  
9 there is proper venue, but there is only proper venue if it is  
10 alleged on where they reside?

11                  MR. ROCHON: I think that the court -- another way to  
12 put it, in our view, is where plaintiffs have brought a case  
13 where it is not properly venued, they shouldn't be given as  
14 liberal treatment where they might send it.

15                  Under 1404, if you get to 1404, which assuming it is  
16 properly venued, we haven't spoken as much about the 1404  
17 motion in this argument because if we lose on 1406 for some  
18 reason, whether it is because it is not properly brought now,  
19 waiver, reconsidering the contacts, what have you, and we  
20 reached plaintiffs' motion under -- so we're here, the  
21 argument, then the reason to move it under 1404 by plaintiffs  
22 just dries up.

23                  I don't think if this was properly venued, there would  
24 be a very good argument why to go to Brooklyn if it was  
25 properly venued. We have given it short-shrift in our papers,

15QJSOKM

Motions

1 and I may have ask for rebuttal time. That is what I wanted to  
2 tell the court regarding the issues here.

3 The bottom line for the defendants is that we think  
4 the plaintiffs' asserted reasons why we shouldn't go to DC  
5 evaporate, meaning they say it will be delayed and we are going  
6 to remove on motions. We are not going to remove on motions  
7 and the delay doesn't hold water. We'll reserve anything else  
8 if the court has additional questions.

9 THE COURT: Yes, sir.

10 MR. TOLCHIN: Good morning, your Honor.

11 I think one thing I agree is that whatever court this  
12 case is heard in, I would like to take your Honor with us.

13 THE COURT: No offense.

14 MR. TOLCHIN: I can appreciate the depth of getting  
15 into these issues. I think at the very beginning, your Honor,  
16 you touched on something, you touched on the way we actually  
17 can wind up keeping your Honor with us because you're a hundred  
18 percent right, the issue was waived.

19 Your Honor, in questions touched on the issue of the  
20 difference between contacts for the purposes of jurisdiction  
21 and contacts for the purposes of venue. It is not like the  
22 defendants aren't here in New York. They're here. They have a  
23 presence here. They have a real presence here. They have a UN  
24 presence. They even have presence that is not connected to the  
25 UN.

15QJSOKM

Motions

I recognize your Honor found for jurisdictional purposes it is not enough, but it is not like we hailed them into the Southern District of Idaho or something. This isn't some random jurisdiction for them. They're here every single day. Their prior lawyer was based here in New York. Right now the only connection, the only thing that differentiates DC from New York, it is not the defendants' contacts or the defendants' presence or convenience of the defendant, frankly, it is the defendants' two new lawyers in DC as opposed to the old lawyer based in New York.

THE COURT: Tell me what you want me to do that doesn't have the word "if" in it.

MR. TOLCHIN: Okay. I think you should deny their motion and keep the case. However --

THE COURT: So are you withdrawing your motion?

You see, however, that is the tricky part of saying, "however."

MR. TOLCHIN: You told me not to say if, Judge. Here is the thing. Really practical, really, really practical, I believe they waived it. They didn't make the motion. The case is here 7 years. They could have made this very same motion when they made a motion to dismiss years ago. We all know why they didn't make the motion.

The reason is what they've danced around but didn't quite say is what is the new circumstance? Why they're making

15QJSOKM

Motions

1 the motion today is because they didn't think of it. The  
2 argument the wrong venue has an effect on personal jurisdiction  
3 under an ATA claim was something the defendants in another  
4 case, Worts versus Bank of China, came up with, and Judge  
5 Lambert down in DC first denied it, but on reargument, he said  
6 you know, you may have something there, I'll transfer the case  
7 to New York. That just happened recently, a few months ago.  
8 They said, oh, my God, there is this argument we could have  
9 made, just no one ever made it before, we didn't think of it.  
10 That is not a changed circumstance.

11 That is not like the building was standing and then it  
12 was demolished. That was a legal argument that would have been  
13 that would have been just as valid had it been made 7 years ago  
14 ago as it had been made today. That is not a changed  
15 circumstance, the fact a lawyer didn't think of another ground  
16 to move to dismiss.

17 Because it could have been raised and wasn't, it was  
18 waived, and the result is we're here. But, slash if, slash  
19 however, there is a danger because I doubt that the defendants  
20 will let go of the argument and it will be hanging over our  
21 heads forever, ill-will hanging over our heads till the end of  
22 the case, we'll do all this work, have a trial and on appeal  
23 they may raise it.

24 THE COURT: Is your application to get out of the  
25 Southern District of New York?

15QJSOKM

Motions

1                   MR. TOLCHIN: Reluctantly, my application is to go  
2 over there to Brooklyn, where at the time this complaint was  
3 filed, 7 plaintiffs resided, where today I believe 6 plaintiffs  
4 reside in addition to others who reside in New Jersey.

5                   It keeps the case in New York, which is just as  
6 convenient for the defendants who are in the Southern District.  
7 It is only a mile further away. They cannot possibly claim a  
8 greater inconvenience by having to -- frankly, regardless of  
9 whether the case is heard in the Southern District or the  
10 Eastern District, when it comes time to depositions in New  
11 York, for example, they'll probably be in my office which is in  
12 Brooklyn, so it is the same thing.

13                  We have many considerations. Handling this case down  
14 in DC will be much, much more expensive for the plaintiffs.  
15 For the defendants, it will be the same thing because they're  
16 present here in New York. Plaintiffs are individuals. They  
17 would have to stay in hotels. They will have to be separated  
18 from their families during the times of the trial. There are  
19 considerations that are not common. Many of these people are  
20 Orthodox Jews. Kosher food is not readily available in  
21 Washington, D.C. There are no Kosher restaurants, for example,  
22 or maybe one.

23                  THE COURT: You guys are dumping on a bunch of cities  
24 today.

25                  MR. TOLCHIN: I'm sorry.

15QJSOKM

Motions

1 THE COURT: I apologize to my DC colleagues, too.

2 MR. TOLCHIN: In the suburbs there are a few pizza  
3 shops.

4 THE COURT: I am glad I live in Manhattan.

5 MR. TOLCHIN: Manhattan? Trust me, in Brooklyn you  
6 can eat any kind of food, anything at all.

7 THE COURT: Let's focus on the argument that has been  
8 made. First of all, the argument that has been made -- and  
9 obviously their argument is significantly different if I don't  
10 accept that argument -- their argument is that you cannot  
11 assert Brooklyn is not a place that it could have been brought  
12 because you allege that their contacts were the basis for  
13 venue.

14 MR. TOLCHIN: I'll answer that with a topic heading  
15 "nonsense" and I'll break it down.

16 First of all, what they're trying to do, and you may  
17 have seen me jumping when he said that, I wanted to say  
18 something. What they're trying to do is blur the procedural  
19 requirements of jurisdiction, the pleading requirements of  
20 jurisdiction with the pleading requirements of venue.

21 Jurisdictional basis has to be pleaded. If I think  
22 this court has subject matter jurisdiction because of  
23 diversity, I have to say so. If I think it is a federal  
24 question, I have to say so. If it is diversity, I have to say  
25 what state the plaintiff lives in and what state the defendant

15QJSOKM

Motions

1 lives in. I don't plead the facts of jurisdiction. That  
2 complaint is subject to dismissal.

3 Venue does not have to be pleaded at all. People do  
4 it. I don't know why. Out of habit? It is always  
5 jurisdiction and venue, but the case after case says there is  
6 no requirement to plead jurisdiction.

7 THE COURT: I don't have the complaint in front of me.  
8 I don't remember that language. What did you -- did you  
9 reference venue?

10 MR. TOLCHIN: When this complaint was filed in 2005,  
11 which was obviously well before the court had opined on whether  
12 or not the contacts with New York were sufficient for  
13 jurisdiction, the allegation was included that the Southern  
14 District of New York is proper venue pursuant to 18 U.S.C. 2334  
15 (a) since defendants Palestinian Authority and Palestinian  
16 Liberation Organization maintain an office, an agent in this  
17 district and are resident in this district.

18 Now, what is significant about that, yes, it could  
19 also, it could also have -- first of all, it wasn't necessary  
20 to have that paragraph. It is not like that paragraph was a  
21 requirement. Under the well-pleaded complaint rule, it should  
22 be disregarded because it was not necessary. We only should  
23 look at what was necessary to be pleaded.

24 Even what it did say was that it invoked 18 U.S.C.  
25 2334 (a), and 18 U.S.C. 2334 says that venue in an ATA action

15QJSOKM

Motions

1 is proper in any district where the plaintiff resides or where  
2 any defendant resides or is served or has an agent. We did  
3 invoke the statute that says that this case could have, says  
4 this case could have been venued where any plaintiff resides.

5 THE COURT: Well, that is not what you alleged. You  
6 didn't allege that you were relying on -- I have to give  
7 them --

8 MR. TOLCHIN: Correct, because none of the plaintiffs  
9 lived in the Southern District of New York.

10 THE COURT: I am saying, I have to at least give him  
11 up front, that is why I asked about what you pled. You did, in  
12 fact, only reference venue with regard to the defendants.

13 MR. TOLCHIN: That is a hundred percent correct. Your  
14 Honor was also a hundred percent correct in what you alluded to  
15 before in a question to Mr. Rochon, that it is the facts that  
16 control venue, not what somebody pleaded.

17 I pleaded they have an office here. I pleaded they  
18 have contacts here. It turns out that is not true, let's say,  
19 okay? That doesn't mean the case gets dismissed if there is a  
20 ground for venue in some other district. The case gets  
21 transferred to that other district.

22 At the time this was pleaded, maybe was no reason at  
23 the time the complaint was filed to allege that plaintiffs  
24 reside in the Eastern District of New York because we were not  
25 filing the case in the Eastern District of New York. We are

15QJSOKM

Motions

1 not trying with the allegation to document or support a choice  
2 of venue in the Eastern District of New York. We are filing in  
3 the Southern District, and even though it wasn't required, we  
4 said what we were relying on for coming into the Southern  
5 District of New York.

6 Your Honor ruled that is not enough, their contacts in  
7 New York are insufficient for jurisdiction, okay? There is  
8 still the question of whether the contacts are sufficient for  
9 venue. Maybe if this had been timely raised, we would win the  
10 issue because they certainly do have contacts here, but the  
11 issue has not been timely raised.

12 Nevertheless, the plaintiffs did choose a New York  
13 forum. They chose a New York City forum. Yes, it was not --  
14 we didn't file this in the Eastern District, but we do cite a  
15 case in our papers saying that the plaintiffs' choice of forum  
16 should also be given weight even if the plaintiff lives in a  
17 neighboring state. That was Burroughs Wellcome versus Giant  
18 Food. So you filed it in Delaware when you meant to file it in  
19 Maryland or something like that.

20 This is even simpler. We are here. It is both just  
21 districts of New York. They're a mile apart from each other.  
22 You can see one from the other. It is no greater burden on the  
23 defendant or on anybody to transfer.

24 THE COURT: What districts do you say are available  
25 for me to consider if I grant your or their motion to transfer?

15QJSOKM

Motions

1 MR. TOLCHIN: You mean where conceivably might this --

2 THE COURT: Yes.

3 MR. TOLCHIN: I believe there are 42 plaintiffs. Some  
4 of them reside in Israel, so that doesn't count. I am  
5 hesitating only because there are two questions. Where might  
6 it have been or could have been commenced at the time it was  
7 filed versus if we are talking about convenience of material  
8 witnesses. It would have to do with today, not 7 years ago.

9 THE COURT: I think the determinative issue is where  
10 it could have been brought.

11 MR. TOLCHIN: Where it could have been brought, we  
12 list them out in our paper. There is a multiplicity of states  
13 where plaintiffs reside all over the country. Seven of them,  
14 the greatest concentration was the Eastern District of New  
15 York.

16 THE COURT: Right.

17 MR. TOLCHIN: Then we have several in New Jersey,  
18 leaving out the ones in Israel. 19 plaintiffs live in Israel,  
19 and then we have remaining 13 plaintiffs in Illinois,  
20 Pennsylvania, North Carolina, Virginia and France. It is all  
21 over the country.

22 THE COURT: At this point I don't hear anybody saying  
23 keep this case in the Southern District of New York. You both  
24 want transfer from the Southern District of New York.

25 MR. TOLCHIN: You know --

15QJSOKM

Motions

1 THE COURT: That is what you asked for.

2 MR. TOLCHIN: -- that is what I want. I go through  
3 this with my kids. I want this and I want that.

4 THE COURT: That is what you're asking for.

5 MR. TOLCHIN: I chose to bring the case here. I like  
6 this courthouse, I like the Second Circuit, I like your Honor.  
7 I don't think we have done badly here. It is not like I am  
8 trying to get out of this court, the judge hates me or the  
9 system is against me. I have no problem with it here. It is  
10 just a hesitation because of this lingering issue, and I would  
11 hate to see us years down the road and everything coming  
12 undone.

13 THE COURT: I am trying to figure out what your  
14 argument and their argument is since you are both asking me to  
15 transfer this, what your argument could conceivably be that  
16 transferred this to a district that was somehow legally error.

17 MR. TOLCHIN: Legally?

18 THE COURT: Error, E R R O R, yes, error. What I hear  
19 you both saying is judge, while transfer, and we are both  
20 asking you to transfer, we'll only consider you to have made an  
21 error if you don't transfer it to where I ask you to transfer  
22 it to.

23 MR. TOLCHIN: No, I will not, regardless of what your  
24 Honor does, I don't think it is error to keep the case, but I  
25 know they will. I don't think it is error to transfer it to DC

15QJSOKM

Motions

1 or Brooklyn in the sense that it is discretionary.

2 Whatever you do here, you wouldn't be abusing  
3 discretion, although if you transferred it to DC, I would  
4 disagree and I would lament it because it will cost my clients  
5 thousands and thousands of dollars more to litigate this case.

6 In making that discretionary call -- well, on the  
7 issue of error, the only one who is going to holler error is  
8 the defendant who will come years later and say when Judge  
9 Daniels kept this case in 2011, he should have dismissed it or  
10 transferred it, he wasn't allowed to keep it. Therefore,  
11 everything he did should be undone.

12 Now, I don't think, I don't think the Second Circuit  
13 will give much credence to that argument, but you never know.

14 THE COURT: That is not really the argument I am most  
15 concerned about because, quite frankly, I don't have any basis  
16 to keep it here. You're asking me to get rid of it and they're  
17 asking me to get rid of it.

18 MR. TOLCHIN: Your Honor --

19 THE COURT: They're not asking me to keep it?

20 MR. TOLCHIN: Right.

21 THE COURT: Why would I keep it in the Southern  
22 District of New York when I have both sides arguing with each  
23 other and to me about where it is supposed to go, but both  
24 sides are asking me to send it someplace else?

25 MR. TOLCHIN: I'll put myself in what I think your

15QJSOKM

Motions

1 perspective or might be my perspective if I were you. I have  
2 two sides, each trying to -- somehow I can't figure out what  
3 their angle is, but each one is trying to work an angle where  
4 he wants the case, and I should keep this case and don't let  
5 either side get away with anything. You have a basis to keep  
6 it, which is it is a venue argument that was waived.

7 THE COURT: I don't have a basis to keep it unless  
8 that is your application.

9 MR. TOLCHIN: That is part of our application. We  
10 make that argument. We do also say that because they're going  
11 to raise it on appeal, it is playing with fire.

12 THE COURT: I am not talking about what arguments are;  
13 I am talking about what your application is. Your application  
14 is to transfer the case. His application is to transfer the  
15 case. Where am I supposed to look for the application to keep  
16 it here?

17 MR. TOLCHIN: In the portion of the memo of law which  
18 is the opposition to the motion to transfer.

19 THE COURT: Okay. I understand what your positions  
20 are. Your positions are transfer it, but if you decide not to  
21 transfer it where I want you to transfer it, I prefer you just  
22 keep it. That is not the way motions work. As they say, you  
23 have to --

24 MR. TOLCHIN: That is why there are three sides to the  
25 table here.

15QJSOKM

Motions

1 THE COURT: What three sides? That is the problem.  
2 You can't give me three sides and five alternatives.

3 What do you say is -- I assume what you're saying  
4 is -- not assume -- what I read from your papers is you  
5 disagree with them that there is anything inappropriate in  
6 terms of proper venue in this district, but you believe that it  
7 would be, one, more convenient for your -- or as convenient,  
8 not more convenient for your parties, and it would settle in  
9 your mind with regard to unsettled issues, unresolved and novel  
10 issues that you can eliminate by going to Brooklyn as opposed  
11 to staying here or going to DC.

12 MR. TOLCHIN: That is a hundred percent accurate.

13 THE COURT: That is pretty much what it is?

14 MR. TOLCHIN: That is a hundred percent accurate.

15 THE COURT: I am not going to commit reversible error  
16 by denying your motion and I am not going to commit reversible  
17 error by granting your motion.

18 You might argue I am going to commit reversible error  
19 by granting their motion, but with regard to your motion, you  
20 basically under 1404 are saying that it is in my discretion to  
21 do this, that they have asked for transfer, you have asked for  
22 transfer. You are not opposing transfer, but you are saying  
23 that yes, Judge, you can go ahead and transfer this case, but  
24 transfer it to Brooklyn. They'll want to transfer it to DC or  
25 Virginia.

15QJSOKM

Motions

1                   MR. TOLCHIN: They have asked for the case to be  
2 transferred, their memo of law says to a district where it  
3 might have been brought -- sorry -- where it could have been  
4 brought. The last line on the first page of their memo of law,  
5 transferred to a district where it could have been brought.

6                   THE COURT: They say that that district includes DC  
7 and excludes Brooklyn.

8                   MR. TOLCHIN: They tried to finagle that this  
9 complaint which was plainly pleaded to establish the basis of  
10 an S.D.N.Y. jurisdiction and plainly never even attempted to  
11 lay out the foundation of an E.D.N.Y. jurisdiction, that they  
12 say this complaint should bar us.

13                  Well, no, if we had meant to plead the Eastern  
14 District of New York, we would have laid out the contacts with  
15 the Eastern District of New York. If the content of the  
16 complaint is to be determinative, I would respectfully ask to  
17 file an amended complaint, where I would lay out the basis of  
18 Eastern District jurisdiction venue that existed at the time  
19 the original complaint was filed and it is not different than  
20 today.

21                  We have the factors for the court to consider are the  
22 plaintiffs' choice of forum which was New York, not some other  
23 far-flung district, and the convenience of the parties. That  
24 weigh much more heavily in the plaintiffs' favor. The  
25 plaintiffs actually live here. The defendants are actually

15QJSOKM

Motions

1 here. Plaintiffs who don't live here find this forum, the New  
2 York, Southern or Eastern District, to be much more convenient  
3 because they either live close by or there are personal  
4 considerations.

5 The defendant is no more or less inconvenienced in New  
6 York or DC. The statute, Congress deliberately gave, wrote in  
7 the statute that the case can be brought where any plaintiff  
8 resides. It was plainly convenience of the plaintiffs that  
9 Congress had in mind.

10 Congress, frankly, didn't care where the party accused  
11 of terrorism lived. This case, if we had a plaintiff who lived  
12 in Alaska, we could have brought this case in Alaska,  
13 notwithstanding the defendants' offices are just in DC and New  
14 York. We could have brought this case in Hawaii or Guam, for  
15 that matter. Congress was concerned about making it more  
16 convenient for the plaintiff.

17 In any event, the choice between Brooklyn and DC is no  
18 less convenient for the defendants.

19 THE COURT: Okay, I'll look at it. I don't have any  
20 more questions. I want to ask Mr. Rochon, because his argument  
21 is obviously more of an argument that I am compelled to make  
22 certain choices with. Their argument is that I can't accept  
23 the choices.

24 Is it your position that if I were to reject your  
25 position that Brooklyn is not available as a place to transfer

15QJSOKM

Motions

1 this case, do you have any other argument that would say that  
2 it can't be transferred to Brooklyn?

3 MR. ROCHON: If I understand the court's question, if  
4 you find my argument it must go to DC unavailing such that  
5 you're exercising your discretion where you would send it, you  
6 want to know what my argument is?

7 THE COURT: I would like to know whether or not you  
8 have any other argument Brooklyn is not, it can't go to  
9 Brooklyn other than they only asserted venue based on the  
10 defendants' contacts with the Southern District of New York.

11 MR. ROCHON: Well, yes, your Honor, ultimately what  
12 happens is we've asserted it is improper, venue improperly lays  
13 here. The plaintiffs say, therefore, they should have the  
14 benefit of the 1404 criteria in where it goes. We're  
15 suggesting where a case is misvenued, that's not the case.

16 We are also suggesting analytically once you deal with  
17 our motion and it is either granted or denied, then if you move  
18 the case based on the plaintiffs' motion, certainly the  
19 plaintiffs moving their own filed case, and under 1404  
20 presumably moving what they claim is a correctly venued case,  
21 the kind of discretion given to sometimes consider the issues  
22 of the plaintiffs is weighty. We have cited cases to that.

23 The plaintiffs come in to say venue at that point,  
24 after having filed -- in our view, misfiled -- venue should be  
25 considered for their benefit. We don't think the case law

15QJSOKM

Motions

1 supports that.

2 THE COURT: You're not arguing if the choice of forum  
3 I make -- if I grant your motion to transfer this case, that  
4 the choice of forum that I make among the available choices is  
5 somehow reversible error if I pick one over the other?

6 MR. ROCHON: We have suggested you can only send it to  
7 the District of Columbia.

8 THE COURT: I understand why. That argument is  
9 because you say Brooklyn is not available as an option?

10 MR. ROCHON: Right.

11 THE COURT: I am asking you if Brooklyn is available  
12 as an option? There is reversible error if I choose Brooklyn  
13 or DC?

14 MR. ROCHON: The plaintiffs have asked you to change  
15 the calculus at this point. The question is would we claim  
16 there was error in exercise of your discretion?

17 THE COURT: Is there an error?

18 MR. ROCHON: When you're dealing with a foreign  
19 litigant, where there is particular sensitivity where they're  
20 haled into court, yes.

21 THE COURT: That is the compelling, that part we  
22 discussed this, I don't mean to be facetious about it, I  
23 characterize it as their comfort level because there is no  
24 other real substantive difference that you're arguing between  
25 the two districts they prefer. They have a better reaction to

15QJSOKM

Motions

1 be litigating in DC?

2 MR. ROCHON: It is where they are.

3 THE COURT: They're here, too.

4 MR. ROCHON: It is where their characters are  
5 cognizable. You're asking me as between Brooklyn and DC, we  
6 are not in Brooklyn.

7 THE COURT: Ultimately what I am asking you, too, is  
8 this: Is it your position, as I said to the plaintiff, look,  
9 both sides are asking me, my first decision that has to be made  
10 is whether or not I am going to grant your joint motion to  
11 transfer this case, okay?

12 Now, you've got to tell me whether or not, if I am  
13 willing to grant your motion to transfer this case, but I am  
14 not willing to transfer it to where you want it transferred to,  
15 whether or not you are withdrawing that motion?

16 That is what I am trying to figure out. That is what  
17 you came to me to do here. You both have to tell me. That is  
18 my approach. You are both asking me to transfer this case.

19 I am ready to grant both of your applications to  
20 transfer. The only question, where is it going to go? That is  
21 the way I will approach this unless you tell me that well,  
22 Judge, if you are going to approach it that way, I am  
23 withdrawing my motion, I will state right here I most like --  
24 you won't be able to complain about my transferring this case  
25 because you're both asking me to transfer this case, all right?

15QJSOKM

Motions

1            You may be able to complain about where it is  
2 transferred to based on whether or not -- you probably have a  
3 better argument than they have that they can argue where it is  
4 transferred to.

5            MR. ROCHON: Especially since he said he wouldn't  
6 complain if it was transferred to DC.

7            THE COURT: Within my discretion there is no  
8 particularly compelling reason to pick one over the other, and  
9 even from your perspective, I understand your clients'  
10 concerns, but those aren't particularly compelling reasons that  
11 make one forum the more compelling forum to transfer the case  
12 to if you want to get out of the Southern District of New York.

13           My approach is this: My approach is look, now both  
14 sides have an application to transfer this case. I am willing  
15 to transfer this case, but I will look and decide where I think  
16 it is appropriate to transfer it to. It seems to me the only  
17 argument you have with regard to my committing any error in  
18 that regard is if I transfer it to a district where it cannot  
19 be brought.

20           If I transfer it to Brooklyn, and you have a  
21 legitimate argument that venue doesn't lie in Brooklyn or can't  
22 be transferred to Brooklyn now because they didn't allege  
23 grounds, the plaintiffs' contacts for venue, then that would be  
24 error, and it is sent back to me from the Second Circuit on  
25 that and tell me no, you can't transfer it to Brooklyn, you

15QJSOKM

Motions

1 have to find somebody else where you could send it to and send  
2 it there. If I transfer it to DC, they might grumble about it,  
3 but it doesn't seem they have a whole lot of bunch of legal  
4 arguments I made legal error inconsistent with the law because  
5 I transferred it to DC.

6 I am telling you both now that look, it is not going  
7 to be my -- I am not sitting here, I am not giving you the  
8 option of saying Judge, transfer the case, but I only want you  
9 to transfer the case if you transfer it to where I want it to  
10 go. You tell me you want transfer. I am going to give you  
11 transfer. Then I will tell you where, I will pick a forum that  
12 I think is the place that is legally available and a place that  
13 I think is within my discretion, a place where this case could  
14 have been brought or might have been brought depending on what  
15 I think is a distinction to be drawn here, and then if that is  
16 a place it couldn't, it couldn't be brought, you can argue  
17 about it.

18 MR. ROCHON: I can see Mr. Tolchin wants to stand. I  
19 will answer the court. I will be very brief. If the court  
20 were to do that, you have to deny our motion.

21 THE COURT: No.

22 MR. ROCHON: Our motion is to transfer it to the  
23 District of Columbia.

24 THE COURT: You do not want me to transfer this case  
25 if I don't transfer it to the District of Columbia?

15QJSOKM

Motions

1 MR. ROCHON: That is correct.

2 THE COURT: If I don't transfer it to the District of  
3 Columbia --

4 MR. ROCHON: On our motion, then you deny our motion  
5 and we are here.

6 THE COURT: Your motion is not to transfer this to a  
7 district where it could have been brought?

8 MR. ROCHON: Well, in our interpretation, that is one  
9 place --

10 THE COURT: That is one place.

11 MR. ROCHON: -- called the District of Columbia. That  
12 is our motion. We think the case should be transferred and may  
13 only be transferred to the District of Columbia which in our  
14 reading of 1406 could only have been brought in the District of  
15 Columbia.

16 THE COURT: If I decide not to transfer it to the  
17 District of Columbia, you want to stay here?

18 MR. ROCHON: I'll sit down respectfully and look  
19 forward to litigating with this Court.

20 THE COURT: I am not sure, I am not sure with that  
21 position you have preserved your right to appeal.

22 MR. ROCHON: It will be extremely unpleasant to  
23 litigate with the court. We think that is what you're required  
24 to do.

25 THE COURT: No. You see the problem is now you

15QJSOKM

Motions

1 changed it into a 1404 motion --

2 MR. ROCHON: No.

3 THE COURT: -- because you're choosing a place that  
4 you think is most convenient.

5 MR. ROCHON: No.

6 THE COURT: Why can't I pick Virginia?

7 MR. ROCHON: Because, Judge, we have said that our  
8 argument, whether you accept it or not, it could only have been  
9 brought in the District of Columbia because the plaintiffs have  
10 premised venue on our contacts.

11 THE COURT: You just told me you could go to Virginia.

12 MR. ROCHON: No. I said you denied all of this and  
13 you reached Mr. Tolchin's motion. I am testing his claim it is  
14 all about speed. Why doesn't he stand up and ask you to go to  
15 Virginia?

16 THE COURT: You said more than. You said you would be  
17 willing to go to Virginia.

18 MR. ROCHON: What I am suggesting, Judge, you have  
19 pointed out each side -- Mr. Tolchin had arguments why he  
20 thinks he has to go to Brooklyn. He claims there is no Kosher  
21 food in the District of Columbia. You think I am exposing some  
22 tactical interest. My good friends who eat kosher would be  
23 surprised to find this out and perhaps they can get guidance.  
24 The District of Columbia, Silver Spring, Maryland, Montgomery  
25 County? Are you serious?

15QJSOKM

Motions

1 MR. TOLCHIN: Which are not the District of Columbia.

2 If you're staying --

3 THE COURT: Stop, stop, stop. Please sit down.

4 The reality, substance of both of your arguments why  
5 it should be in any particular jurisdiction is not particularly  
6 compelling. It is not because your client feels more  
7 comfortable with DC is not something I can get my hands around  
8 and because there are not enough Kosher restaurants in DC is  
9 not something I can get my hands around. That won't be  
10 determinative.

11 MR. ROCHON: One thing on the comfort level.

12 My view is that foreign litigants when they're hailed  
13 into court are given in context of discovery, in context of  
14 consideration of contacts, some beneficial considerations. I  
15 think that those are things that you should weigh heavily, in  
16 our view. When you ask me why I want to be there, it is  
17 ultimately for my client. Mr. Tolchin says because I am there.  
18 I litigated with Mr. Tolchin in Florida. If I would prefer  
19 Florida if I prefer to go. For my convenience, I can pick  
20 better places than the District of Columbia for where I would  
21 like to be.

22 MR. TOLCHIN: He likes the judge in Florida.

23 MR. ROCHON: The point is, your Honor, I don't think  
24 the court -- we feel that is a factor that should be weighed  
25 heavily if you get to discretion, which we suggested on our

15QJSOKM

Motions

1 motion you really don't get to. Thank your Honor.

2 MR. TOLCHIN: May I just interject two quick things.

3 First of all, your Honor took the words out of my  
4 mouth as to one point. Comfort level is not one of the  
5 criteria listed in the statute for the court to consider when  
6 deciding convenience of the parties. Comfort level of a  
7 foreign entity who likes Washington over New York, that is just  
8 not listed.

9 THE COURT: I assume your position is a little  
10 different than his. His position, as just articulated, is if I  
11 am not willing to transfer it to DC, then he doesn't want to  
12 transfer it to anyplace else. Is that your position that if I  
13 am not going to transfer it to Brooklyn, that you don't want it  
14 transferred, period?

15 MR. TOLCHIN: If you're asking me my position, yes,  
16 that's correct.

17 THE COURT: I am asking your position.

18 MR. TOLCHIN: Mr. Rochon misquoted -- or it is harsh  
19 to say misrepresented, but inaccurately portrayed his own  
20 motion. On his notice of motion, which is Docket Entry 93, it  
21 begins by saying that they respectfully request the court  
22 dismiss the case or transfer the case to a district in which it  
23 could have been brought.

24 Yes, he goes on to the second page to say for those  
25 reasons and those set forth in the accompanying memorandum of

15QJSOKM

Motions

1 law, dot, dot, dot, the court should transfer the case to the  
2 District of Columbia. He has it both ways.

3 THE COURT: That is why I originally asked because the  
4 argument you just gave me may apply to transfer, but it doesn't  
5 apply to a motion to dismiss.

6 MR. TOLCHIN: He goes on in his memo of law to say to  
7 a district in which it could have been brought.

8 MR. ROCHON: Your Honor, we have a proposed order that  
9 lays out we ask it be dismissed or sent to the District of  
10 Columbia. We interpret where it could have been brought to  
11 mean only one place. We have been clear on that throughout.  
12 That is our argument. Whether you accept it or not, he can't  
13 say we are seeking to go move it somewhere else. That we  
14 haven't done.

15 THE COURT: Your position is that is not based on your  
16 convenience or comfort level argument; that is based on your  
17 argument that that is the only place where it could have been  
18 brought?

19 MR. ROCHON: Exactly.

20 THE COURT: Since that is the only place it could have  
21 been brought, it should not be sent to Brooklyn. You're not  
22 arguing the convenience, balance of convenience is due a 1404  
23 weighing?

24 MR. ROCHON: I only spoke about that because you asked  
25 me. You said if I have to choose, what would you argue. I

15QJSOKM

Motions

1 have I told you. I wouldn't say I refuse to answer your  
2 question.

3 THE COURT: Lawyers do that and that usually informs  
4 my decision.

5 MR. TOLCHIN: By that token, if we originally pleaded  
6 this case as an Eastern District case in the Eastern District,  
7 and we then had come to the same point, they would say that  
8 they had no right to transfer it to DC even though that is  
9 where they are because we alleged venue based on where the  
10 plaintiffs are. That just belies the whole -- you're stuck  
11 with what you pleaded as being nonsense. You plead what you  
12 think you need to get into the courthouse where you're trying  
13 to get into.

14 As you can see, there are 20 other courthouses where  
15 this case could have been brought into all over the country.  
16 We wouldn't plead Texas, a plaintiff lives in Texas if we are  
17 not trying to get into a Texas court.

18 THE COURT: I have one final question.

19 Mr. Rochon, you can either answer it or consider it.  
20 If I don't grant your motion to transfer it to DC and I grant  
21 the plaintiffs' motion to transfer, or if I am inclined to  
22 grant the plaintiffs' motion to transfer it to Brooklyn, do you  
23 even want the opportunity to waive venue and stay in this  
24 district?

25 MR. ROCHON: I believe the court offered me the

15QJSOKM

Motions

1 opportunity to consider your question. I would like to take  
2 the court up on that opportunity, if I may.

3 THE COURT: Okay. There is more than one way to skin  
4 a cat. This is helpful. I am going to resolve this pretty  
5 quickly.

6 MR. ROCHON: The court would like an answer. You  
7 asked me to consider it?

8 THE COURT: If you want to answer it.

9 MR. ROCHON: You are asking me to say --

10 THE COURT: If you want, you don't have to.

11 MR. ROCHON: Can I reply in writing, by letter?

12 THE COURT: Do you want to?

13 MR. ROCHON: Yes, I would like an opportunity.

14 THE COURT: Do you want to consult first and reply in  
15 letter and see what your position is. If you do that quickly,  
16 as soon as I get your letter, I will be prepared to rule.

17 How quickly will you get me a letter on that issue?

18 MR. ROCHON: Monday is a holiday. I can still write  
19 on holidays, but I won't send it until Tuesday.

20 THE COURT: Send it over and I will try to give you a  
21 decision next week so you can move on or move away.

22 (Court adjourned)